B6

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

FEB 24 2004

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a shoe and leather goods firm. It seeks to employ the beneficiary permanently in the United States as a luggage and shoe repairer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the proceedings below, eligibility in this matter turned, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 13, 1998. The beneficiary's salary as stated on the labor certification is $403.60 per week or $20,987.20 per year. The evidence in the record, however, raises the more fundamental issue of whether the petitioner is the prospective employer of the beneficiary as required by 8 C.F.R. § 204.5(c).

In his review of the petitioner's initial submissions, the director determined that counsel had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 5, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE specifically requested the petitioner's corporate income tax returns for 1998 and 1999. The RFE also requested an explanation of why the petitioner's income tax return for 2000 showed no amounts for compensation of officers or for salaries or wages.

Counsel responded to the RFE with a letter, dated April 29, 2002, accompanied by copies of the petitioner's corporate income tax returns for 1998 and 1999 and by copies of quarterly wage reports for the years 1998 and 2001 for Sams Shoe Service, Inc.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing to the present. The director then denied the petition.

The petitioner's notice of appeal was signed December 19, 2002 and was filed January 2, 2003. In the notice of appeal, counsel states that the petitioner's evidence establishes its ability to pay the proffered wage. In the notice of appeal counsel also requested 60 days to submit a brief and/or evidence. A separate letter explained that the additional time was needed because of travel planned by the "owner of the petitioning company" and the onset of the holidays.

Counsel later submitted a letter, dated March 31, 2003, with an additional copy of the petitioner's tax return for 1998 and new documentary evidence offered to establish the petitioner's ability to pay the proffered wage. These submissions were apparently received by the Administrative Appeals Office on about April 1, 2003. Counsel's reasons for requesting 60 days to submit a brief and additional evidence are found to constitute good cause for such an extension, which would be until March 3, 2003. Counsel's submissions on appeal occurred 29 days beyond that date. But since no prejudice resulted to the government from this further delay, we will grant a further extension until April 1, 2003, the date the evidence submitted on appeal was apparently received by this office.

In submitting evidence on appeal, counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director. If the ability to pay the proffered wage were the only issue considered in this appeal, the newly-submitted evidence would be precluded from being considered on appeal by a ruling in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), since the petitioner had notice of that issue and ample opportunity to submit evidence on that issue prior to the decision of the director. However, the decision in this appeal also involves the more fundamental issue of whether the petitioner is the prospective employer of the beneficiary. The petitioner was not notified explicitly about that issue in the proceedings below, nor does any regulation specifically discuss the definition of the term "employer" for petitions filed under INA § 203(b)(3) and 8 C.F.R. § 204.5(c). Therefore, we find that the newly-submitted evidence is not precluded by *Matter of Soriano* from being considered on appeal.

The director's decision focused exclusively on the issue of the petitioner's ability to pay the proffered wage. The director found that the petitioner's tax returns showed a taxable income of $16,317 with depreciation of $2,641 for 1998, income of negative five dollars with depreciation of $2,135 for 1999, and income of negative $37,844 with depreciation of $2,135 for 2000. Although the director did not use the term "taxable income" when referring to 1999 and 2000, the director took the income figures for those years from the taxable income line on each year's tax return. The director found that the petitioner had failed to show sufficient income to pay the proffered wage in any year since the priority date was established.

The director did not consider the petitioner's assets and liabilities. A review of the petitioner's tax returns shows that the petitioner had net current assets of $66,598 at year's end in 1998, $87,771 in 1999, and $95,551 in 2000. If the petitioner's ability to pay the proffered wage was the only issue raised by the evidence, those figures might establish that fact for the three years covered by those tax returns.

The director's denial was based on a failure of the petitioner to establish its ability to pay the proffered wage. But the director should have addressed the more fundamental question of whether the petitioner is the prospective employer as required by 8 C.F.R. § 204.5(c).

The regulation at 8 C.F.R. § 204.5(c) states in pertinent part:

> *Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act.

As noted above, the director's RFE dated February 5, 2002 requested an explanation of why the petitioner's 2000 tax return showed no amounts for compensation of officers or for salaries and wages. Counsel's response to the RFE failed to include any explanation on that point. At the time the RFE was issued, counsel had not yet submitted copies of the petitioner's tax returns for 1998 and 1999. Those returns were submitted as part of counsel's response to the RFE. Like the return for 2000, the returns for 1998 and 1999 show no amounts for compensation of officers or for salaries and wages.

The Form ETA 750 filed on January 13, 1998 states the name of the employer as "Crocker Industries," and states the address where the alien will work as "Sam the Shoe Doctor, 132 S. Franklin, Chicago, IL 60606."

A letter in evidence dated November 10, 2001 from Albert Levin, president of Crocker Industries, states that Crocker Industries currently has 44 employees. The letter describes "Sam the Shoe Doctor, Inc." as a subsidiary of Crocker Industries, Inc. However, the tax returns for Crocker Industries, Inc. contain no entries for assets which can be identified as shares in the claimed subsidiary Sam the Shoe Doctor, Inc. The letter from Albert Levin seems to suggest that the beneficiary would be employed by the petitioner's subsidiary. Yet the letter explicitly names Crocker Industries as the intended employer.

The petitioner's evidence also includes quarterly wage reports for [redacted] [sic]. Those wage reports cover the years 1998 and 2001. They show a high of $281,519.93 paid in wages for the quarter ending 12/31/98 and a low of $134,175.93 for the quarter ending 9/30/01. Counsel's notice of appeal describes [redacted] as an "outlet" of the petitioner [redacted] But nothing in the evidence in the record prior to the director's decision explains the legal relationship between either "Sams Shoe Service, Inc." or "Sam the [redacted] No request has been made to substitute Sams Shoe Service, Inc. or [redacted] ndustries as the petitioner.

The evidence in the record prior to the director's decision, as summarized above, therefore fails to establish that the petitioner is the prospective employer of the beneficiary. Nor does the evidence submitted for the first time on appeal establish that fact.

The evidence submitted for the first time on appeal includes a Form 1120S tax return for 1998 from [redacted] which counsel describes as "in care of the same owner," [redacted] Counsel's letter states that [redacted] s within the same corporate group affiliated with Crocker Industries and 'Sam the [redacted] Counsel states that the net income of [redacted] Inc. is itself sufficient to pay the beneficiary's proffered wage. In a footnote, counsel's letter refers to [redacted] s a "holding company." Counsel's submissions fail to specify the nature of the affiliation among the corporations mentioned. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The new evidence on appeal also includes a letter, dated April 3, 2003, fro [redacted] the accountant/office manager of [redacted] which states "Jose Ramirez has worked for a group of shoe repair shops under separate corporations owned by a partnership. I am providing financial information on two of these corporations." These statements fail to specify which corporation or corporations the beneficiary Jose Ramirez has worked for and fail to state that the petitioner Crocker Industries intends to employ the beneficiary.

The other document offered in evidence for the first time on appeal is an affidavit of [redacted] signed as chief financial officer of [redacted] That affidavit describes [redacted] as "a group of companies specializing in the sale and repair of shoes, boots and luggage." The affidavit also states, "Our corporation, *including various divisions and affiliates,* currently employs in excess of 100 workers." After certifying the ability of the petitioner to pay the prevailing wage, the affidavit states, "*In addition, the Beneficiary is already currently employed by the Petitioning Company.*" Affidavit of Albert Levin dated March 31, 2003 (emphases in the original).

The affidavit from [redacted] fails to specify the legal relationship among [redacted] and "its various divisions and affiliates." By claiming the employees of its divisions and affiliates as the petitioner's own employees, the affidavit ignores the basic principle of corporate law that separate corporations are separate legal entities. The affidavit fails to specify which legal entity currently employs the beneficiary or which legal entity intends to offer him permanent employment. In stating that the beneficiary is currently employed by the

petitioner, the affidavit is inconsistent with the most recent tax returns submitted by the petitioner, which were for the year 2000 and which showed no amounts paid in salaries and wages.

Therefore the evidence submitted for the first time on appeal provides no further support to establish that the petitioner [redacted] is the intended employer of the beneficiary.

The evidence in the entire record therefore fails to establish that the petitioner [redacted] ends to employ the beneficiary. Rather, the evidence indicates some other entity, either [redacted] is the prospective employer.

For the above reasons, the decision of the director to deny the petition was correct. The basis of that decision, however, should not have been the failure of the petitioner to establish its ability to pay the proffered wage, but rather the failure of the petitioner to establish that it is the prospective employer of the beneficiary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.